Metrocare Home Services, Inc. *and* Community and Social Agency Employees Union, District Council 1707, AFSCME. Cases 2–CA–30301 and 2–CA–31636[1]

December 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On June 30, 1999, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief, the General Counsel filed an answering brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt the judge's recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Metrocare Home Services, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Suzanne K. Sullivan, Esq., for the General Counsel.

Jonathan P. Arfa and *Leonard Benowich, Esqs. (Roosevelt & Arfa, LLP)*, of White Plains, New York, for the Respondent.

Harvey S. Mars, Esq. (Law Offices of Leonard Leibowitz), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was heard in New York, New York, on October 26, November 3, and December 7, 1998. The complaint alleges that the Respondent, in violation of Section 8(a)(1) and (5) of the Act, announced a reduction in wages without notice to the Union and that the Respondent implemented the wage reduction without having reached impasse with the Union.[1] The Respondent denies that it has engaged in any violations of the Act and asserts that the parties had reached an impasse in bargaining and that the wage reduction was justified by business exigencies and financial need.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent on January 12, 1999, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in New York, New York, is engaged in the business of providing home health care. Annually, the Respondent derives gross revenues in excess of $100,000 and receives goods and materials valued in excess of $5000 directly from points outside the State of New York. The Respondent admits and I find that

[1] No exceptions were filed to the judge's recommended Order that Case 2–CA–31636 be severed and dismissed.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In its exceptions, the Respondent contends, inter alia, that the judge erred in finding an unfair labor practice that was not alleged in the complaint, i.e., that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally announcing a wage reduction on February 12, 1997. We find no merit in this exception.

"It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. [Footnote omitted.] This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses. [Footnote omitted.]" *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Here, the complaint factually alleges that on February 12, 1997, the Respondent issued a memorandum announcing the wage reduction without providing the Union notice or opportunity to bargain. At the hearing, testimony from the Respondent's own witnesses established that such a memorandum was, in fact, issued on February 12, 1997. Further, the announcement issue was closely connected to the subject matter of the complaint, which concerned the subsequent implementation of the same wage reduction that was announced on February 12, 1997. Accordingly, we find that the *Pergament* test has been satisfied and that the judge properly found the announcement of the wage reduction to constitute a violation of Sec. 8(a)(5) and (1).

In agreeing with the judge that the parties did not reach impasse in their negotiations on March 13, 1997, we find it unnecessary to rely on her comment that "[o]nce the Respondent apparently decided to lower wages, no matter what the Union response, there was no opportunity for real bargaining to take place and a declaration of impasse was thus unfounded."

In finding the violation, Member Hurtgen notes that, on February 12, 1997, Respondent's vice president Savino announced that "I am reducing the wage rates." As of that date, there had been only two bargaining sessions, and there was not even a claim of impasse. The effective date for the reduction was February 22, although the date was later changed to March 29, and the implementation on March 29 was precisely the same as the one announced on February 12. Although the February 12 announcement did not necessarily take away the "opportunity for real bargaining" (see above), the announcement does show that *the decision* was made on February 12, i.e., at a time when there was not even a claim of impasse.

[1] The allegations in Case 2–CA–31636 which had been consolidated with Case 2–CA–30301 were settled by the parties and were withdrawn at the instant hearing. Although counsel for the General Counsel apparently believed that she made a motion to sever the cases, the official transcript does not record such a motion. Therefore, I shall order that Case 2–CA–31636 be severed from the instant proceeding and that it be dismissed.

it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Community and Social Agency Employees Union, District Council 1707, AFSCME, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

On May 28, 1996, the Union was certified as the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate unit:

> All full-time and regular part-time home care workers, home attendants, home health aides, certified home health aides, personal care aides, certified personal care aides, and home makers employed by the Employer.

The Respondent admits that the Union is the exclusive collective-bargaining representative of the employees in the appropriate unit.

The Respondent is a for profit agency that provides home health care for mostly elderly, homebound, and disabled patients. The patients have physical disabilities and some suffer from dementia and character disorders. The patients are referred by the city of New York Human Resources Administration pursuant to contracts between the city and the Respondent. After an assessment of a newly referred patient, the Respondent sends either a home health aide or a personal care aide to provide the requisite services to the patient.[2] In 1996, the Respondent had three contracts with the city of New York: a new Bronx contract which did not yet have any patients, a Manhattan contract to provide basic personal care and a "difficult to serve" contract which involved patients with extreme medical conditions or unsafe environments. In 1996, two thirds of the Respondent's business volume came from the difficult to serve contract. All of the Respondent's contracts provide an hourly Medicaid direct reimbursement rate. The rate covers overhead, the cost of social workers, rent, professional liability insurance, and compensation. The rate is divided into a direct budget and an indirect budget. The direct budget covers wages and benefits to the aides and it is set at $8.88 per hour of work performed by the aides. The Respondent is not allowed to make a profit from the direct budget. Any part of the $8.88 per hour that is not spent compensating the aides must be returned to the city. The indirect budget covers all the rest of the Respondent's expenses. The Respondent's profit must be realized from the indirect budget. Savino testified that in 1994 Respondent spent $10,000 more on labor costs than provided for in the $8.88 per hour compensation rate in the direct budget for the difficult to serve contract. The coverage was subsidized out of the Respondent's profit on the indirect budget. In 1995, the compensation rate was still $8.88 and the Respondent exceeded the difficult to serve direct budget by $115,000. In 1996, the rate was still frozen and the Respondent overspent the difficult to serve direct budget by nearly $300,000. The record does not permit an evaluation of these figures since the Respondent did not present evidence as to the amount of the indirect budget and it did not reveal the amount of its profits. The Manhattan basic personal care contract labor reimbursement rate was a little higher than $8.88 per hour. In 1994, 1995, and 1996 the Respondent received more money in the Manhattan contract for direct labor costs than it spent and it had to return some money to the city. The Respondent cannot use money from one contract to cover deficiencies in another contract.

The Respondent pays its aides $5.90 per hour. In addition, the Respondent pays the aides overtime, weekend differential, and a sleep-in rate. After 6 months of employment, an aide who works 160 hours per month is eligible for health insurance. When an aide has worked 2100 hours for the Respondent, a 30-cent-per-hour differential is added to the hourly rate of compensation.

In 1996, the Respondent employed about 600 home health aides at any one time. Over a 12-month period, about 950 to 1000 aides would have been on the payroll.[3] Aides often work for more than one home health agency. For instance, an aide may work for the Respondent during the week and for another agency on the weekend, and some aides split a day between two agencies. If an aide has been working with a patient who dies or goes to the hospital, the aide may cease working for the Respondent if a competitor agency can immediately offer a better job in terms of location or hours.

Following the Union's certification, the Respondent and the Union met four times for the purpose of negotiating a collective-bargaining agreement. The Union was represented by Leonard Leibowitz and Harvey S. Mars, Esquire, accompanied by a negotiating team made up of union officials and employees. A union official active in the negotiations and who testified herein was Ninfa Vassallo.[4] The Respondent was represented by Jonathan P. Arfa, Esquire, who was accompanied variously by Ronald Carkner, Esquire, and Thomas Savino, the Respondent's vice president.

2. Collective-bargaining negotiations

a. The first session

The first bargaining session took place on July 29, 1996. The full union negotiating team was present. Attorney Arfa was there with Savino. The Union presented the Respondent with an outline list of demands covering wages, benefits, seniority, days off, and many other subjects. The Union demanded a raise of $1 per hour, an increase of 50 cents per hour after 2100 hours with the agency, and an increase of 75 cents per hour for a mutual case.[5] The demands provided that employees would join the union health benefits plan and the union pension plan. The parties went through the demands and the Union gave a brief explanation of each demand. Arfa's notes of the meeting show that the parties had an extensive discussion of the

[2] A home health aide is certified to perform more tasks than a personal care aide.

[3] In addition, the Respondent was hiring more aides to begin servicing the new Bronx contract.

[4] Liebowitz, whose office is the general counsel to the Union, was the Union's chief negotiator.

[5] A mutual case involves giving care to more than one person at a single location.

health benefits currently provided by the Respondent and the Union's suggestion that employees join the Union's health and welfare plans. The parties discussed the cost of the union health plan and the cost of the company health plan. The parties discussed the difficulty of applying seniority principles in the home care industry. Savino explained that the source of funds for the Respondent was the New York City reimbursement rate and that it had not been increased in a number of years. Savino said that the reimbursement rate was insufficient to meet the Union's wage demands. The Respondent suggested that the Union might join in an effort to have the city of New York increase the reimbursement rate. The Union responded that it would consider this suggestion. The Union requested a list of employees in a certain format, and Arfa asked for copies of the union health and welfare fund and pension trust fund indentures. At the conclusion of the meeting, the Union agreed to draft a full set of formal contract proposals and send it to the Respondent.

b. The second session

The second bargaining session took place on October 23, 1996. The union negotiating team was led by Mars. Arfa attended the meeting on behalf of the Respondent, accompanied by Carkner and Savino.[6] The Union presented its demands in the form of a draft contract and the parties went over every item.[7] The draft contract included a demand that the employees receive benefits under the union health and welfare fund. The amount of the wage demand was left blank. Arfa recalled that the key issues discussed at the meeting were reimbursement rates under the city contracts and the source of funding for any increases. Arfa did not respond to the Union's contract demands. He said that the Respondent would study the demands and send a response to the Union. Savino told the Union that the reimbursement rate was insufficient and that the Respondent's trend to overspend its direct labor budget was getting worse. More and more aides were reaching the 2100 hours' seniority point and receiving the 30-cent differential which took their hourly wage to $6.20. In addition, more aides were becoming eligible for health insurance and the Respondent's health insurance premiums were rising. Savino asked the Union to attend a meeting with the city and press for an increase in the reimbursement rate. The Union declined to attend such a meeting.

c. Correspondence

On November 4, 1996, Mars wrote to Arfa asking for the Respondent's counterproposals to be sent as soon as they were completed, and stating that he would send Arfa the trust indentures as soon as he himself received them from the Union.

On November 27, Mars wrote to Arfa enclosing the trust indentures for the pension and welfare funds and asking Arfa to send the Respondent 's counterproposals as soon as possible so that another negotiating session could be scheduled.

On December 17, Arfa responded to Mars that he had been very busy but that he expected to send Mars a set of responses to the Union's demands shortly after the first of the year.

Mars wrote to Arfa on January 23, 1997, stating that the Union was still waiting for the Respondent's counterproposals and asking that they be sent no later than the end of the month.

On February 5, 1997, Arfa sent Mars the Respondent's contract proposals and responses to the Union's demands. Arfa's letter said, "I would hope that at the next session the Union will be in a position to advance constructive thoughts and proposals relative to the economic issues." The Respondent's formal document answered many of the Union's demands with the phrase "Economic issue: deferred for later discussion." The subjects deferred included the Union's demands relating to wages, holidays, leave, pension, health and welfare, timesheets, and carfare. The Respondent did not offer any economic proposal of its own in the February 5 documents. Arfa testified that the Respondent wished to defer the economic aspects of the Union's demands until after the noneconomic issues were disposed of.

Arfa testified that the Company's response to the Union's demands was that it wanted to defer all economic issues "for discussion as a lump sum of economic issues." Arfa would not agree with counsel for the General Counsel that this answer meant that the Company wished to discuss noneconomic issues first. Indeed, Arfa said the Respondent would discuss anything the Union wanted to discuss. When asked in what way the Respondent was prepared to discuss economic issues even though it wished to defer economic issues for a later discussion, Arfa replied that if the Union had proposed a wage cut to finance other benefits that would have been a matter for discussion.

d. February 12, 1997 memorandum

On February 12, 1997, without notice to the Union, Savino distributed the following memorandum to the Respondent's home attendants:

> As a result of the Human Resource Administration freezing our reimbursement rate at a 1994 level, I am reducing the wage rates accordingly:
>
> (1) Weekend differential rate is an additional 50 cents an hour.
>
> (2) Overtime will be 50 cents an hour above the regular wage. Please note the 50 cents applies to overtime on sleep-in cases as well.
>
> (3) For aides on a live-in case, the night differential rate will be $10 per day.
>
> These rates become effective February 22, 1997.

The current weekend differential was $1.10 per hour, the current overtime rate was 75 cents per hour and the current live-in differential was $16 per day.

Savino testified concerning the events that led to his issuance of the February 12 wage reductions. In the spring or summer of 1996, Savino received a note from William Schnell, the Respondent's president, telling him that the agency was beginning to lose a lot of money on the difficult to serve contract. In November he met with Fred Stein, the Respondent's controller,

[6] Arfa's recollection that the meeting took place on November 23 or 29 was incorrect.

[7] The Union called this draft the "boilerplate" demands.

and he learned that the trend was worse; for the first 6 months of 1996, the Respondent spent $178,000 more than it received for labor costs and this figure was expected to double by the end of the year. Savino did not testify as to the amount of the Respondent's overhead reimbursement nor did he describe the Respondent's profits on the various contracts it has with the city. Savino and Schnell discussed several options to reduce labor costs. It was possible for the Respondent to curtail health insurance benefits for employees who had other family insurance or who reduced their actual hours worked. Another alternative was to find a different health insurance plan. Or the Respondent could reduce labor costs by reducing wages. In January 1997 Savino met with Schnell and Stein and went over the internal financial statement for 1996. They found that the Respondent had overspent its direct wage reimbursement by $300,000 on the difficult to serve contract. Although there was a meeting between Respondent's officials and the city director of Home Care Services to discuss the situation, the city refused to raise the reimbursement rate. Schnell ordered Savino to effect reductions in wages. Savino distributed the February 12, 1997 memo to the employees. However, the reductions did not become effective because the Respondent's labor counsel told Savino that the Union had a problem with the memorandum and "we needed to have a bargaining session."

As soon as they became aware of the memorandum, Vassallo wrote to Savino and Mars wrote to Arfa demanding that the unilateral wage changes be rescinded.

Arfa sent a letter dated February 24 to Mars stating that the Respondent had rescinded its memorandum reducing wage rates. Arfa's letter continued:

> Please be advised that it is the Agency's intention to raise the issues contained in said Memorandum as its first priority of negotiations when we meet on March 10, 1997 and I would request that your client be prepared to address same immediately.

Arfa testified that he had not been aware of the February 12 memo before Mars informed him that it had been distributed to employees.

e. The third session

The parties met for a third bargaining session on March 10, 1997. Arfa attended this meeting with Savino and Carkner. Leibowitz and Mars led the union negotiating team.

Arfa told the Union that the Respondent was spending too much on compensation. He said that the excess was partly due to the cost of health insurance and to the general increases in the cost of doing business such as social security costs and professional and malpractice insurance. Arfa's position was that the Union should bargain over the economic matters that were covered in the February 12 memorandum. Arfa testified that as of March 10 the parties had not agreed to any noneconomic issues. According to Arfa, the meeting ended when the Union said it wanted a few days to figure out whether it could come up with anything to help the Respondent avoid the reductions proposed in the February 12 memo. Arfa's bargaining notes show that the parties discussed the current compensation structure of the unit employees and that the Union made a 3-year wage proposal and asked that the Respondent contribute to the Union's pension and welfare funds.

Arfa agreed that the Respondent did not make an economic offer in his February 5 response. According to Arfa, his letter of February 24 to Mars stating that the Respondent wanted to discuss the reductions set forth in the February 12 memorandum to employees at the next negotiating session was the first specific economic proposal given to the Union. On March 10, according to Arfa, the Respondent's February 5 proposals had not been rescinded.

Savino testified that on March 10 he discussed the insufficient reimbursement rate with the Union and asked the Union for suggestions on ending what he characterized as "the overspending." The Union said that it opposed the implementation of the reductions announced by the Respondent. Savino had brought figures showing the aggregate cost of health insurance for the employees. However, his data were not broken down to show per capita premium rates and so they did not permit any comparison with the Union's health fund costs.

Vassallo testified that on March 10 the parties discussed wages. The Union caucused and then proposed that the wage rate be increased to $7 per hour in the first year of a new contract, $7.50 per hour in the second year, and $8 per hour in the third year. The parties discussed using the Union's health and welfare fund to provide medical insurance to the employees instead of reducing the wages. The Union believed that its coverage might be more economical than the insurer then used by the Respondent.

By letter of March 11, Mars requested that Arfa provide the monthly or quarterly premium rate for the Respondent's health insurance for the last 5 years.

f. The fourth session

The parties met again on March 13, 1997. Arfa was present with Savino and Carkner. The Union was represented by Leibowitz and a negotiating committee.

According to Arfa, he began the meeting by saying that the issue for discussion was the wage cuts proposed by the Respondent. Arfa recalled that the Union said that it had no ideas about alternatives to the cuts. Arfa then asked Leibowitz what else he wanted to talk about and Liebowitz said that he had nothing else to talk about. Arfa's notes show that he raised the issue of the proposed reductions at the beginning of the meeting and that Liebowitz said that he would not agree to the cuts. Leibowitz asked what was next and Arfa replied that they should explore options and if there were none, then "we are at impasse." The notes say that Leibowitz replied, "I guess so" and then asked for a union caucus to see if there were any ideas. After the caucus, Arfa's notes say that Leibowitz says he has no thoughts and "he thinks it at the end. No place to go for either side. Has to be warfare. Thinks Union will try to react to implementation even though at impasse." Arfa then read the requested insurance premium information to Leibowitz and answered a question about the Respondent's rejection of a nondiscrimination clause. Then Leibowitz said, "We have to do what we have to do. There's nothing left to talk about." Arfa said, "Guess so, we're at impasse and going to implement." Arfa said they should adjourn sine die and Leibowitz agreed.

On cross-examination Arfa recalled that when Leibowitz said there would be warfare, he had replied that home care workers do not come out when they are called.

Savino also testified that Liebowitz stated "we were at impasse."

Carkner testified about the March 13 meeting. However, his testimony was based on reading Arfa's notes. He could not recall any discussion about possible savings on health insurance costs and he could not recall any union wage proposal. Carkner also attended the October 23, 1996, and March 10, 1997 meetings but he had no independent recollection of those meetings. I shall not rely on Carkner's testimony because I do not believe that he had any independent recall of the relevant events.

Leibowitz testified that on March 13, the parties discussed the Respondent's position that it would implement a wage decrease. At the end of the meeting, the Respondent said it would implement the decrease with or without the Union's agreement. Leibowitz said, "you'll do what you have to do, we will do what we have to do." Leibowitz did not recall that anyone used the word impasse. Leibowitz testified that when Arfa said that the Respondent would implement there was an implication that the parties were at impasse, but no one used the word impasse.

Leibowitz' notes show that the parties discussed the Respondent's business and its three city contracts. Then the Union caucused came back into the meeting saying that it would not agree to any cuts. The Respondent said that it would implement its proposed wage reductions. After another caucus, the Respondent gave the Union its health insurance costs from 1992 to 1997 broken down into per capita and total costs.

Leibowitz did not believe that the parties were at impasse. He testified that he had repeatedly asked the Respondent for a full overall proposal in response to the Union's demands. But Arfa had wanted to discuss noneconomic matters before making an economic proposal and the Respondent's February 5 written proposals had contained no economic items. After the February 12 memorandum was issued, Arfa had taken the position that he could not make a proposal because the Respondent had an outstanding request to reduce wages. The parties had not reached agreement on any matters by March 13.

g. Implementation of wage reductions

On March 29, 1997, the Respondent implemented the cuts originally proposed on February 12. It did not implement the entire proposal it had made on February 5, 1997.

Arfa testified that the Respondent did not claim inability to pay the increases demanded by the Union. Respondent only claimed that it was paying more for labor than the rate of city reimbursement and that it did not wish to continue subsidizing its labor costs. The change in compensation implemented on March 29 did not stem from an overall corporate inability to pay.

B. Discussion and Conclusions

The General Counsel relies on *Bottom Line*, 302 NLRB 373 (1991), as controlling in the instant case. In that case, the Board said:

> [W]hen . . . the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole. The Board has recognized two limited exceptions to this general rule: "[w]hen a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining," and when economic exigencies compel prompt action. [Footnotes omitted. 302 NLRB at 374.]

It is undisputed that in the instant case the implementation of the reductions in premium pay constituted a unilateral change. I must therefore decide whether an overall impasse had been reached in bargaining for the agreement as a whole. If I find that no such overall impasse had been reached, I must next decide whether the Union had delayed bargaining or whether the Respondent was subject to an economic exigency.

I find that Arfa's recollection of the events relating to the instant case is not as accurate as that of Leibowitz. At various points in the hearing Arfa testified with certainty about what he did and when he did it only to be refuted by documentary evidence. Therefore, I shall not credit Arfa's version of the March 13 bargaining session. Further, I find that Arfa's notes of March 13 reflect the Respondent's position to declare the negotiations at impasse so that it could proceed to implement the wage reductions it had announced 1 month before.[8] I find that the notes do not accurately transcribe what Leibowitz said at the meeting. I credit Leibowitz that at the March 13 meeting he did not say that the parties were at impasse. I credit Leibowitz that the Respondent came into the March 13 session with the expressed intention that it wanted to discuss a wage reduction. I credit Leibowitz that the Respondent said it would implement the premium rate decrease with or without the Union's consent. Leibowitz understood the Respondent to be implying that there was an impasse so that it could reduce the employees' premium pay. However, the mere declaration that an impasse exists does not make it so.

Based on the bargaining history of the parties, I cannot find that they were at overall impasse for the agreement as a whole. The parties had met four times. At the first session in July 1996, the Union presented its demands in outline and the parties proceeded to discuss them. Many issues were discussed, including health benefits and the possibility of using the union health plan, the wage increase demand and the alleged insufficiency of the reimbursement rate for labor costs. Both sides asked for information, and the Respondent asked for copies of the health plan trust indentures. At the second session in October 1996, the Union presented a full draft of its demands. The parties discussed funding for a wage increase and the rising cost of health insurance. Beginning in November 1996, the Union regularly wrote to Arfa asking that the Respondent's counterproposals to the Union's demands to be sent. These were given to the Union in February 1997. Although Arfa testified that the Respondent wished to defer the economic

[8] I do not credit Savino that Liebowitz stated that the parties were at impasse. Savino had a selective memory when he testified.

aspects of the Union's demands until the parties agreed on noneconomic issues and although the Respondent's written response deferred all economic items for later discussion, Arfa's cover letter asked that the Union advance proposals relative to the economic issues. Arfa explained this apparent contradiction on cross-examination by stating that the Respondent would have been prepared to discuss economic issues if the Union had proposed a wage cut to finance other benefits. In effect, the Respondent made its first economic proposal on February 12 when it announced that it would reduce premium pay. The last two bargaining sessions of March 10 and 13, 1997, were devoted to the Respondent's announced proposal to cut premium pay. The parties discussed the cost of health insurance and the possibility of saving money on health insurance rather than reducing wages. The Union requested information on March 11 so that it could establish the extent of possible savings under the Union health and welfare plan.

In the four sessions of bargaining, the parties had not agreed to any contract provisions. They had not discussed extensively many of the demands in the Union's draft contract. They had not discussed extensively the proposals the Respondent had sent to the Union in February. At the final session, the Union said that it would not agree to wage cuts and the Respondent replied that it would nevertheless implement the cuts. The record establishes that after the Respondent presented its demands by announcing an unlawful reduction directly to employees, it never took the time to discuss alternatives with the Union, even though the Union stated its belief that money could be saved by placing the employees in the Union's welfare fund. Moreover, the record shows that discussion of these alternatives might well have been productive. The Respondent's own management had suggested saving money on health insurance as a possible solution to the labor cost problem. The Union had been suggesting the possibility of cheaper insurance and it had been trying to obtain the information necessary to explore such a solution during the period of negotiations. It is clear that further discussion of health insurance costs would not have been futile.

The Respondent had taken 4 months to deliver its response to the Union's demands. The Respondent's response was self-contradictory and even Arfa was incapable of making sense of it. The written response provided that the Respondent wished to defer discussion of economic issues, but Arfa's cover letter and the Respondent's own actions showed that the opposite was true. Given the Respondent's tactics, it would have been almost impossible for the parties to bargain effectively. Therefore, it cannot be said that the parties had exhausted good-faith negotiations. Once the Respondent apparently decided to lower wages no matter what the Union's response, there was no opportunity for real bargaining to take place and a declaration of impasse was thus unfounded.

From my discussion of the facts above, it is clear that there is absolutely no evidence in the record to show that the Union delayed bargaining.

In *RBE Electronics of S.D.*, 320 NLRB 80 (1995), the Board discussed the economic exigency exception set forth in *Bottom Line*, supra. The Board recognized the existence of circumstances which might excuse unilateral action while bargaining is ongoing. It described these circumstances as a "compelling business justification" requiring prompt action. The Board additionally recognized the existence of other economic exigencies which, while not sufficiently compelling to excuse bargaining altogether, would permit the employer to make unilateral changes after giving notice and an opportunity to bargain to the Union. These circumstances were described by the Board as those where "time is of the essence and which demand prompt action" and the exigency was "caused by external events, was beyond the employer's control, or was not reasonably foreseeable." 320 NLRB at 82 (footnotes omitted).

I cannot find that economic exigency justified the Respondent's implementation of the premium pay cuts. Arfa testified that the Respondent did not claim inability to pay the wage increases demanded by the Union. A fortiori, the Respondent cannot claim inability to pay the wages in effect while the parties were bargaining. Thus, the Respondent has not shown that it was subject to the exception which would permit it to take unilateral action without any notice to or bargaining with the Union. The Respondent wished to cease diverting to its wage costs a portion of the reimbursement destined to its overhead and profits. But, as Arfa acknowledged, there was no overall corporate inability to pay wages at an increased level, let alone at the current level. The Respondent was in a position where its profits were being squeezed. This is a common occurrence in the business world and it hardly qualifies as an economic exigency. The Respondent had been aware of a trend of diminishing profits due to the city reimbursement freeze for several years. More to the point, the record contains no evidence that prompt action was required to save the Respondent from some dire financial fate. All that the record discloses is that there had been a decline in profits and that the Respondent's managers were determined to halt this decline. Even if I were to find that the situation herein constituted the type of economic exigency where the Respondent was entitled to take unilateral action after notice to the Union and an opportunity to bargain, I would not find that the parties had reached impasse on the matter proposed for change. As stated above, the record shows that it may well have been productive for the parties to discuss savings in health care to offset increased wage costs. The Union was attempting to discuss this solution with the Respondent when the Respondent declared impasse.

Finally, it requires no extensive discussion to find that the February 12 announcement of a wage cut directly to the employees without any notice to the Union was unlawful. *NLRB v. Katz*, 369 U.S. 736 (1962).

CONCLUSIONS OF LAW

1. At all times material, Community and Social Agency Employees Union, District Council 1707, AFSCME, has been the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time home care workers, home attendants, home health aides, certified home health aides, personal care aides, certified personal care aides, and home makers employed by the Employer.

2. By announcing a wage reduction without notice to the Union and by implementing a wage reduction at a time when no impasse in bargaining with the Union had occurred, the Respondent violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unilaterally implemented a reduction in wages at a time when no impasse had occurred, I shall order the Respondent, on request, to bargain collectively in good faith with the Union on terms and conditions of employment of unit employees and, if an understanding is reached, to embody the understanding in a signed agreement.

I shall order the Respondent to reinstate the wages and terms and conditions of employment that existed before its unlawful changes, and to make whole unit employees for any losses suffered as a result of its unlawful action in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Metrocare Home Services, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Announcing wage reductions without notice to the Union, and implementing wage reductions at a time when no impasse in bargaining with the Union has occurred.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time home care workers, home attendants, home health aides, certified home health aides, personal care aides, certified personal care aides, and home makers employed by the Employer.

(b) On request, reinstate the wages and terms and conditions of employment that existed before the unlawful unilateral changes.

(c) Make the employees whole for any loss of earnings and other benefits suffered as a result of the unlawful changes in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 12, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 2–CA–31636 is severed from the instant proceeding and that it is dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT announce wage reductions to our employees without notice to their Union.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT reduce the wages of our employees when no impasse in bargaining with the Union has occurred.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with Community and Social Agency Employees Union, District Council 1707, AFSCME, and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time home care workers, home attendants, home health aides, certified home health aides, personal care aides, certified personal care aides, and home makers employed by the Employer.

WE WILL, on request from the Union, reinstate the wages that existed before the unlawful changes we made.

WE WILL make our employees whole for any loss of earnings and other benefits resulting from our unlawful reduction of their wages, plus interest.

METROCARE HOME SERVICES, INC.